95-1079

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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December 15, 1995

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-4006, 95-1058

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs-Appellants,

v.

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 94 C 603 -- John C. Shabaz, Judge.

ARGUED MARCH 28, 1995
DECIDED AUGUST 23, 1995
PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC DENIED
SEPTEMBER 20, 1995

Before BAUER, EASTERBROOK and RIPPLE, Circuit Judges.

RIPPLE, Circuit Judge. In this appeal, a solid waste trade association and several Wisconsin landfill operators bring a Commerce Clause challenge against a Wisconsin statute. The statute forbids waste generators from using the State's landfills unless they generate waste in a region that has adopted an "effective recycling program," as defined by Wisconsin law. The district court, while striking down other sections of the statute, upheld the sections under review here. It reasoned that these sections did not discriminate against interstate commerce and that the local benefits outweighed the burdens imposed on interstate commerce. For the reasons that follow, we reverse and remand for further proceedings.

I
BACKGROUND

A. *Facts*

Over the last decade, fewer and fewer solid waste landfills have remained available in Wisconsin to dispose of a steadily increasing amount of waste. In response to this situation, Wisconsin enacted legislation designed to manage the flow of solid waste into its landfills. In relevant part, the statute bars individuals from disposing of eleven specifically enumerated recyclable materials in the State's solid waste landfills. Wis. Stat. sec. 159.07(3).[1] Thus, waste containing any of these items

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[1]The statute provides, in relevant part:

Beginning on January 1, 1995, no person may dispose of in a solid waste disposal facility or burn without energy recovery in a solid waste treatment facility in this state any of the following: (a) An aluminum container.

(b) Corrugated paper or other container board.

(c) Foam polystyrene packaging.

(d) A glass container.

(e) A magazine or other material printed on similar paper.

may not be dumped in the State.

The statute recognizes, however, an exception to this general prohibition. Under the exception, both in-state and out-of-state generators of solid, non-medical waste may send waste that contains quantities of the banned items to Wisconsin landfills if the waste is generated "in a region that has an effective recycling program as determined under [Wis. Stat.] sec. 159.11." *See* Wis. Stat. sec. 159.07(7)(a).[2] Section 159.11 of the statute initially provides that all such programs, whether for communities within Wisconsin or beyond its borders, are subject to approval by the Wisconsin Department of Natural Resources. *Id.* sec. 159.11(1). The statute then outlines the requirements of the "effective recycling program." First, each program must contain a "public education component" detailing reasons and opportunities for recycling, as well as prohibitions on dumping the eleven

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(f) A newspaper or other material printed on newsprint.
(g) Office paper.
(h) A plastic container.
(i) A steel container.
(j) A waste tire, as defined in sec. 84.078(1)(b).
(k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.
Wis. Stat. sec. 159.07(3).

[2] At the time this lawsuit was filed, sec. 159.07(7) provided, in pertinent part: The prohibitions in [sec. 159.07(3)] do not apply with respect to solid waste, except medical waste . . . that is generated in a region that has an effective recycling program, as determined under sec. 159.11, and, if the region is not in this state, the region is located in a state that has an effective siting program, as deter- mined under sec. 159.12. Wis. Stat. sec. 159.07(7)(a). As we note later, the district court struck down the "effective siting" portion of the statute on the ground that it was facially discriminatory and lacked sufficient justification.

items referred to above. *Id.* sec. 159.11(2)(a). Effective recycling programs also must mandate that all of the community's single-family residences and commercial, retail, industrial, and governmental facilities engage in waste-reducing behaviors. Specifically, the statute mandates that these entities either separate the eleven listed materials from their waste or ensure that the waste is treated at a facility that will recover the materials prior to disposal. *See id.* sec. 159.11(2)(b). In addition, all owners of residential buildings containing five or more units, as well as owners of commercial, retail, industrial, and governmental facilities, must provide recycling containers for the occupants of the facility, must ensure that recyclables generated at the site are collected, and must regularly notify occupants of available recycling programs, unless waste from the site is treated at a materials recovery facility. *See id.* sec. 159.11(2)(c), (d). These requirements apply to all waste generators and facility owners in the community, irrespective of whether they, or, in the case of facilities, their occupants, actually dump waste in Wisconsin.

Enacting communities must meet several additional requirements. For example, the effective recycling program must establish systems for collecting separated recyclable materials from the region's single-family residences, *id.* sec. 159.11(e), as well as for processing and marketing the recyclables the community collects, *id.* sec. 159.11(em). The community must prohibit the disposal, in either a solid waste disposal or treatment facility, of any of the eleven listed items that have been separated for recycling. *Id.* sec. 159.11(2)(er). In addition, communities must adhere to any additional rules promulgated by the Wisconsin Department of Natural Resources. *id.* sec. 159.11(2)(f). Every community also must provide for "[a]dequate enforcement" of the programs established under the statute, *id.* sec. 159.11 (2)(g), acquire all the equipment necessary to implement those programs, *id.* sec. 159.11(2)(h), and make a

"reasonable effort" to reduce the "amount, by weight" of the eleven listed materials generated as solid waste in the region, *id.* sec. 159.11(2)(i). With respect to non-Wisconsin communities, the statute mandates that they comply with any recycling laws of their home state as well as with the requirements of the Wisconsin statute. *Id.* sec. 159.11(2e)(a). The statute directs the Wisconsin Department of Natural Resources to promulgate rules for comparing the programs of non-Wisconsin municipalities to Wisconsin municipalities or counties. *See id.* sec. 159.09(1). Areas of comparison must include the level of financing, enforcement mechanisms and effort, and the number of materials being separated and recycled. *Id.* sec. 159.11(2e)(b).

The most significant feature of the Wisconsin statute, for purposes of this case, is the requirement, discussed above, that all citizens in the effective recycling community must observe the statute's recycling provisions, whether or not they actually dump waste in Wisconsin. *See id.* 159.11(2)(b), (c), (d); *see also id.* sec. 159.11(2)(g) (obligating communities to establish effective enforcement provisions). With respect to out-of-state communities, the statute thus obligates every waste generator in a community with an effective recycling program to adhere to Wisconsin's standards, either by separating out recyclable materials or by sending waste to a materials recovery facility, even if their waste is intended for dumps in Illinois, Minnesota, or Iowa. Everyone in the community either must separate recyclables or must use a materials recovery facility in order for anyone to receive access to Wisconsin's landfills.

B. *Earlier Proceedings*

Appellants National Solid Wastes Management Association, Valley Sanitation Co., Land Reclamation Co.,

and Waste Management of Wisconsin, Inc. ("NSWM"),[3] challenged the Wisconsin solid waste legislation under the Commerce Clause and 42 U.S.C. sec. 1983. The district court accepted NSWM's argument in part, and held unconstitutional two portions of the legislation, R.61 at 14-16; Wisconsin has not appealed that decision. The district court held infirm the statute's "formal rulemaking" and "effective siting" requirements. The former provision mandated that the Wisconsin Department of Natural Resources approve non-Wisconsin communities' effective recycling programs via formal rulemaking. Wis. Stat. sec. 159.11(1) (1993). No such requirement applied to in-state communities. The latter provision barred Wisconsin landfills from accepting solid waste from any state unless the amount of new solid waste disposal capacity sited in that state during the past four years exceeded the amount of waste the state generated during that period. *Id.* sec. 159.12(3).

The district court rejected, however, NSWM's claim that Wisconsin's "effective recycling program" requirement violated the Commerce Clause. The court determined that the requirement was neither facially discriminatory, nor discriminatory in practical effect. Therefore, it evaluated the statute under the balancing test the Supreme Court set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Because factual disputes existed concerning "the extent of the burden imposed upon out-of-state communities," the district court declined to grant either party summary judgment. R.61 at 13.

Following a bench trial, the court ruled in favor of the State. It concluded that the Wisconsin statute's "sole

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[3] NSWM is a not-for-profit solid waste management trade association. The other three plaintiff-appellants are owners and operators of Wisconsin landfills that accepted out-of- state waste in 1993. They collectively will be referred to as "NSWM."

burden on commerce is the requirement that out-of-state municipalities would be required to recycle all waste, 80 percent of which will not be sent to Wisconsin landfills." Tr.III at 230. The court reasoned, however, that "the cost to change [to a Wisconsin-approved recycling program]" and "the administrative burden" of compliance "would be limited." *Id.* at 234-35. Next, it found that the statute would provide several local benefits, particularly the conservation of landfill capacity and the protection of the environment. The court concluded that the statute's putative local benefits outweighed its "small burden on interstate commerce," *id.* at 238, and dismissed NSWM's remaining claims with prejudice.

II
DISCUSSION

Our standard of review following a bench trial in the district court is well established. We review the district court's factual findings for clear error. Fed. R. Civ. P. 52(a); *Thornton v. Brown*, 47 F.3d 194, 196 (7th Cir. 1995); *see Maine v. Taylor*, 477 U.S. 131, 144-45 (1986) (applying standard in Commerce Clause context) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). We review the district court's legal conclusions, including its determination that the Wisconsin statute did not discriminate against interstate commerce, de novo. *Market St. Assocs. Ltd. Partnership v. Frey*, 21 F.3d 782, 785 (7th Cir. 1994); *cf. Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1278-83 (7th Cir. 1992) (reviewing Commerce Clause challenge to state municipal solid waste statute), *cert. denied*, 113 S. Ct. 977 (1993).

NSWM submits that the Wisconsin statute violates the Commerce Clause per se because it regulates commerce occurring wholly outside Wisconsin. It notes that the statute conditions dumping access on the observance of an "effective recycling program" by all

residents of a municipality, whether or not they actually dump waste in Wisconsin. NSWM also submits that the statute should receive strict scrutiny because it treats similar products differently depending upon their point of origin. It argues that the statute does not survive strict scrutiny because Wisconsin may serve adequately its goals of preserving dwindling landfill space and protecting the environment through reasonable non-discriminatory alternatives.[4] Alternatively, NSWM claims that the Wisconsin program fails the *Pike* test because its burden on interstate commerce is significant. Finally, it submits that the district court erred in dismissing its sec. 1983 claims even though the court found two provisions of the Wisconsin statute unconstitutional.

A. *Commerce Clause*

1.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several states." U.S. Const. art. I, sec. 8, cl. 3. Although this language does not expressly limit the states' ability to interfere with interstate commerce, the Supreme Court consistently has held that the Clause contains a further negative command, known as the "dormant Commerce Clause," which "prohibits States from taking certain actions

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[4] For example, NSWM notes, the State could narrow the scope of its law to apply only to individuals who dispose of waste in Wisconsin. Wisconsin could also require those who haul waste into the State to ensure that their customers comply with Wisconsin's mandates. Moreover, Wisconsin could mandate that all waste be treated at a "materials recovery facility" ("MRF") prior to dumping. Such treatment would eliminate the need for an individual to separate out recyclable materials. Indeed, NSWM notes, the current statute permits generators to use MRFs in lieu of separating out recyclables, but only if the waste generator resides in a community that has adopted an effective recycling program.

respecting interstate commerce even absent congressional action." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987); *see also Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345, 1349 (1994); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995). In essence, "[t]he 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) (quotation and citation omitted). The dormant Commerce Clause applies with full force to state regulation of the collection, transportation, processing, and disposal of solid waste.[5]

The Supreme Court has adopted what amount to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).[6] When a state statute directly regulates or discriminates against interstate commerce, or

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[5] See C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1682 (1994) ("[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."); Fort Gratiot Sanitary Landfill, Inc., 504 U.S. at 359 ("Solid waste, even if it has no value, is an article of commerce.") (citing Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978)); Government Suppliers Consolidating Servs., Inc., 975 F.2d at 1277 ("Garbage is, under the prevailing case law of the Supreme Court, indisputably an article of commerce[.]").

[6] See Scariano v. Justices of the Supreme Court, 38 F.3d 920, 926 (7th Cir. 1994), cert denied, 115 S. Ct. 2582 (1995)(noting that these two approaches govern dormant Commerce Clause analysis).

when its effect is to favor in-state economic interests over out-of-state interests, the Court generally has "struck down the statute without further inquiry." *Brown-Forman Distillers Corp.*, 476 U.S. at 579 (citations omitted).[7] When, however, a state statute is neutral on its face, has only indirect or incidental effects on interstate commerce, and regulates evenhandedly, it is analyzed under a second test. *See C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Under this approach, the state statute will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Supreme Court also has noted that "there is no clear line" separating the category of state regulation that is virtually per se invalid and the category subject to the *Pike* test. *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *cf. National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir.) (treating cases involving facially discriminatory statutes and those involving statutes with "powerful" discriminatory effects as separate categories subject to the same rigorous scrutiny), *cert. denied*, 115 S. Ct. 2579 (1995). The "critical consideration" in determining the appropriate degree of scrutiny is the "over-all effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Government Suppliers Consolidating Servs., Inc.*, 975 F.2d at 1277. Having set forth the governing principles, we now consider whether Wisconsin's solid waste legislation runs afoul of the Commerce Clause.

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[7] See Alliance for Clean Coal, 44 F.3d at 595 (noting that such state statutes are "subject to the strictest scrutiny") (quotation and citation omitted).

B. *The Wisconsin Statute*

1.

The Wisconsin statute provides that both in-state and out-of-state waste generators are barred from dumping listed materials in Wisconsin landfills unless they reside in a community that has adopted an "effective recycling program." Wis. Stat. sec. 159.07(7)(a); *see also id.* sec. 159.07(3); sec. 159.11. Focusing upon this universal requirement, the district court reasoned that the Wisconsin statute did not merit heightened scrutiny because it was neither facially discriminatory nor discriminatory in practical effect. We find ourselves in respectful disagreement with the district court's conclusion. As we held in *Government Suppliers Consolidating Services, Inc.*, the " 'critical consideration is the overall effect of the statute on both local and interstate activity.' " 975 F.2d at 1278 (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 573). When considering the purpose of the challenged statute, we are not bound by the description given it by the legislature; it is our duty to determine the practical effect of the law. *Id.*

Wisconsin's solid waste legislation conditions the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities' adoption and enforcement of Wisconsin recycling standards; all persons in that non-Wisconsin community must adhere to the Wisconsin standards whether or not they dump their waste in Wisconsin. If the out-of-state community does not conform to the Wisconsin way of doing things, no waste generator in that community may utilize a Wisconsin disposal site. *See* Wis. Stat. sec. 159.11(2)(b). The practical impact of the Wisconsin statute on economic activity completely outside the State reveals its basic infirmity: It essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce. In *Healy v. Beer Institute*, 491 U.S. 324 (1989),

the Supreme Court, through the pen of Justice Blackmun, noted that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Id.* at 332. The Court later elaborated:

> First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states[.] Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.

Id. at 336 (internal quotations and citations omitted).

Healy is consistent with a long line of cases that considered whether state laws violated the Commerce Clause by regulating or controlling commerce occurring

wholly outside the legislating state.[8] These cases make clear that the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state. For example, in *Healy*, the challenged Connecticut statute required out-of-state shippers of beer to agree that the prices they charged Connecticut wholesalers would be no higher than the prices charged the previous month in any state bordering Connecticut. *See id.* at 327. In *Brown-Forman Distillers Corp.*, the challenged New York statute similarly required liquor distillers to agree that they would charge New York wholesalers a price no higher than the lowest price charged to any other wholesaler in the United States. *See* 476 U.S. at 576. The Supreme Court reasoned that each statute violated the Commerce Clause because it "require[d] out-of-state shippers to forgo the

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[8] Brown-Forman Distillers Corp., 476 U.S. at 579 (noting that "[w]hen a state statute directly regulates . . . interstate commerce . . . we have generally struck down the statute without further inquiry"); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality op.) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."); see also Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."); cf. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 43 (1966) (stating that the "mere fact" that the statute at issue was "geared to appellants' pricing policies in other States [was] not sufficient to invalidate" it, and noting that the case at hand did not present evidence of the statute's extraterritorial effects which could be considered "when a case arises that clearly presents them"), overruled, Healy v. Beer Inst., 491 U.S. 324, 343 (1989) ("[T]o the extent that Seagram holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law.").

implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions [were] imported by statute into the [enacting state's] market regardless of local competitive conditions." *Healy*, 491 U.S. at 339; *see also Brown-Forman Distillers Corp.*, 476 U.S. at 583-84; *cf. Baldwin v. G.A.F. Seelig*, Inc., 294 U.S. 511, 520-25 (1935) (striking down New York statute that required out-of-state milk to be sold at prices no less than those set by statute for milk produced in New York; the statute eliminated the competitive advantage enjoyed by milk producers in neighboring Vermont). Likewise, in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Court reviewed an Illinois law that required any takeover offer for shares of a "target company" to be registered with the Illinois Secretary of State. *See id.* at 626-27. The statute defined "target company" as any company in which Illinois shareholders owned ten percent of the securities subject to the takeover offer, or any company that met two of the following criteria: It was organized under Illinois law; its principal place of business was in Illinois; or, it had at least ten percent of its stated capital and paid-in surplus in Illinois. *See id.* at 627. The statute gave the Illinois Secretary of State the authority to hold hearings concerning the fairness of the offer, as well as the power to deny registration to any tender offer that, in his opinion, either failed to provide full disclosure of material information or was inequitable. *See id.* A plurality of the Court reasoned that the Illinois law was infirm because of its "sweeping extraterritorial effect":

> [T]he Illinois law, unless complied with, sought to prevent MITE [a Delaware corporation with principal offices in Connecticut] from making its offer and concluding interstate transactions not only with [the target's] stockholders living in Illinois, but also with those living in other States and having no connection with Illinois. Indeed, the Illinois law on its face

> would apply even if not a single one of [target's] shareholders were a resident of Illinois. . . . Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

Id. at 642 (plurality op.). *Healy, Brown-Forman Distillers Corp.*, and *MITE Corp.* thus establish that the Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states. *Cf. K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) ("No state may require sellers to charge the same price within its borders as they charge elsewhere.")

Although cases like *Healy* and *Brown-Forman Distillers Corp.* involved price affirmation statutes, the principles set forth in these decisions are not limited to that context. *Healy* itself discusses the general principle that "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," and then refers to the more "specific[ ]" application of that principle, that "a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states[.]" *See* Healy, 491 U.S. at 336 (quotation and citation omitted). The breadth of the principle is demonstrated by its use by the plurality in *MITE Corp.* Indeed, only recently the Court has commented, in a case involving state regulation of solid waste processing, that "States and localities may not attach restrictions to exports or imports in order to control commerce in other states." *C & A Carbone, Inc.*, 114 S. Ct. at 1683 (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

The prohibition against direct regulation of interstate commerce by the states has been applied consistently by the circuits. In *NCAA v. Miller*, 10 F.3d

633 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994), the Court of Appeals for the Ninth Circuit held that a Nevada statute that required different procedures in Nevada collegiate athletic association enforcement proceedings than those employed by the NCAA in other states violated the Commerce Clause because it regulated directly interstate commerce. Noting that the NCAA could operate only with uniform procedures in its enforcement proceedings, the court held that the practical effect of the Nevada statute was to require the NCAA to conduct all of its proceedings under the Nevada requirements. "The Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules. . . . In this way, the Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders." *Id.* at 639. Moreover, noted the court, Nevada is not the only state that has enacted or could enact legislation that establishes rules for NCAA proceedings. "The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause." *Id.* at 640.[9]

We are not the first circuit to be confronted with the problem of extraterritoriality in the context of waste

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[9]See also Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995) (stating generally that "a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms"); Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1293 (3d Cir.) ("The Supreme Court has invalidated state statutes where a state has 'projected' its legislation into other states and directly regulated commerce therein, thereby either forcing individuals to abandon commerce in other states or forcing other states to alter their regulations to conform with the conflicting legislation.") (collecting cases), cert. denied, 113 S. Ct. 602 (1992).

regulation. Our colleagues in the Tenth Circuit confronted a similar situation in *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980). In that case, the court considered an Oklahoma statute similar to Wisconsin's solid waste legislation. In relevant part, the Oklahoma law prohibited out-of-state hazardous waste generators from shipping their waste to Oklahoma disposal facilities unless their home state had adopted "substantially similar standards for controlled industrial waste disposal as those which Oklahoma ha[d] enacted." *Id.* at 873. The court concluded that the statute violated the Commerce Clause:

> [Oklahoma's law] imposes an economic embargo on all incoming shipments, unless and until the state of origin enacts a law prescribing standards which are substantially similar to those of Oklahoma. It thus reaches out and seeks to force the enactment in the state of origin of a statute with standards similar to Oklahoma['s] . . . Oklahoma is forcing its judgment with respect to hazardous wastes on its sister states at the pain of an absolute ban on the interstate flow of commerce. As we view the situation, Oklahoma cannot use the threat of economic isolation as a weapon to force other states to enact substantially similar legislation any more than Oklahoma can impose a reciprocity agreement against a sister state. Thus, the mandatory nature of the device or implement is the objectionable part.

Id. (quotations and internal citations omitted).

We believe that the Tenth Circuit has characterized the situation fairly and accurately. Like the Oklahoma statute in *Hardage*, the Wisconsin statute seeks to force Wisconsin's judgment with respect to solid

waste recycling on communities in its sister states "at the pain of an absolute ban on the flow of interstate commerce." *See* Baldwin, 294 U.S. at 524 ("One state may not put pressure . . . upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy."); *cf. New Energy Co. v. Limbach*, 486 U.S. 269, 274-76 (1988) (holding that Ohio law which denied favorable tax treatment to out-of-state ethanol producers unless their states of origin afforded similar treatment to Ohio producers discriminated against interstate commerce); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375-81 (1976) (striking down a reciprocity agreement with respect to sale of milk as discriminatory against interstate commerce). The practical effect of the Wisconsin legislation is to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin; eighty percent of the out-of-state waste subject to this legislation is destined for non-Wisconsin landfills. Out-of-state waste generators who do not dump in Wisconsin but who are located in communities adhering to Wisconsin's "effective recycling program" must therefore bear the costs of complying with the Wisconsin law while their competitors in non-effective recycling communities, who may be dumping solid waste at the very same non-Wisconsin landfill, do not. The Wisconsin statute reaches across the Wisconsin state line and regulates commerce occurring wholly outside Wisconsin. As a price for access to the Wisconsin market, it attempts to assume control of the integrity of the product that is moving in interstate commerce. Wisconsin's approach to sound solid waste management, and no one else's, must govern, even when the product will never cross its borders. The Commerce Clause contemplates a very different market among the states of the Union.

This situation is analogous to the one that confronted the Supreme Court in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). There, the Court was confronted with an unapportioned flat tax on interstate motor vehicles. The Court held that the tax violated the Commerce Clause because it failed the "internal consistency test." The state tax, if imposed by every state, would certainly have placed a burden on the interstate hauler and impeded the flow of interstate commerce. *Cf. Oklahoma Tax Comm'n v. Jefferson Lines*, 115 S. Ct. 1331 (1995) (holding that a sales tax on a bus ticket sold within the state did not violate the dormant Commerce Clause; the tax's identical application by all states would not result in a disadvantage to interstate commerce because each sale would result in one tax).

2.

Although we have characterized the Wisconsin statute as impermissibly regulating directly interstate commerce, we note that the practical effect of the statute could also be analyzed as working a discrimination on interstate commerce. Because Wisconsin's effective recycling program legislation "discriminate[s] in practical effect against interstate commerce, [it is] subject to the higher level of scrutiny," and the State is required to demonstrate that its concerns "cannot be adequately served by nondiscriminatory alternatives." *Government Suppliers Consolidating Servs., Inc.*, 975 F.2d at 1279 (quotation and citation omitted); *see Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 359; *Taylor*, 477 U.S. at 138.[10]

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[10]In Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995), the Eighth Circuit treated the issue of whether a state statute had an "extraterritorial reach" as a separate inquiry from the issue of whether the statute discriminated against interstate commerce. In its view, "[i]t may also be correct to say that 'extraterritorial reach' is a special example of 'directly'

The Wisconsin statute creates an embargo on waste from a hauler from another state, or a community within that state, unless that political entity has decided to adopt the Wisconsin view of environmental management. No matter what the alternate approaches to recycling may offer in terms of environmental benefits and costs, a waste generator/hauler can pass the Wisconsin border only if its community has opted for the Wisconsin plan. Similarly, the Wisconsin disposal site is deprived of the waste from out-of-state not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin's ways. Moreover, the Wisconsin statute places the participant in interstate commerce in a difficult situation with respect to its participation in interstate commerce with other states. As we have noted earlier, if Wisconsin can insist on interstate haulers doing things the Wisconsin way in order to obtain access to the Wisconsin market, other states can insist on similar or different prerequisites to their markets.

Wisconsin submits that it has no alternative means of ensuring that recyclables are eliminated from waste entering Wisconsin other than to require that non-Wisconsin municipalities require that all of their residents adhere to the Wisconsin-mandated recycling program even if the waste is not destined for Wisconsin.

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regulating interstate commerce. The Supreme Court has not clarified this point[.]" Id. at 793 n.3. The Eighth Circuit took the view that, if a statute has the forbidden extraterritorial effect, it is per se invalid. Id. at 793. A statute that commerce is invalid if there is not an important reason for that discrimination. We have no need to determine whether the issue of extraterritorial reach ought to be analyzed distinctly from the issue of discrimination against interstate commerce because, in any event, as we discuss later in this opinion, Wisconsin can proffer no sufficiently important reason for the statute.

Adherence to the program some of the time, i.e., when the waste is actually sent to Wisconsin, creates, the State argues, an impossible enforcement situation. We cannot accept this argument. The solid waste legislation itself makes clear that there is an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan. Specifically, the Wisconsin statute makes clear that, if the waste is processed by a materials recovery facility that separates the eleven listed materials, the waste will conform to the environmental needs of Wisconsin. Accordingly, Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a materials recovery facility with the capacity to effect this separation. Given the existence of such a nondiscriminatory alternative that serves adequately Wisconsin's legitimate concerns, the discriminatory legislation cannot be justified. *Cf. Taylor*, 477 U.S. at 151-52 (upholding state law banning importation of live baitfish because available inspection techniques could not adequately serve state's legitimate purpose of preventing native species from being exposed to parasites).[11]

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[11]With respect to NSWM's sec. 1983 claims, we note that the Supreme Court has held that Commerce Clause violations are cognizable under sec. 1983. See Dennis v. Higgins, 498 U.S. 439, 446, 451 (1991); see also Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson, 48 F.3d 391, 393 (9th Cir.), cert. denied, 115 S. Ct. 2580 (1995); Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1389 (8th Cir. 1993). Thus, for the reasons set forth in the text, NSWM is entitled to such relief with respect to its claim concerning the effective recycling program. With respect to NSWM's other claims, the district court's December 15, 1994 summary judgment ruling granted NSWM's motion "as it concerns the rulemaking requirement found in the final sentence of sec. 159.11(1), Wis. Stats., and the effective siting requirement found at section 159.12(3), Wis.

3.

Given the nondiscriminatory and less burdensome methods that could be implemented to ensure the segregation of recyclable materials before the waste is committed to a Wisconsin landfill, we also note that, if it were necessary to reach the issue (or if our earlier characterizations of the Wisconsin scheme as discriminatory and a direct regulation of interstate commerce were found to be erroneous), the Wisconsin scheme still could not pass muster under the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under that approach, even when a state statute regulates interstate commerce indirectly and non-discriminatorily, the burden imposed on that commerce must "not be excessive in relation to the local interests served by the statute." *MITE Corp.*, 457 U.S. at 643. The need of Wisconsin to execute a sound and vigorous environmental policy is indeed substantial, but, as we have noted above, it has certainly not demonstrated in this litigation that it must pursue it in the way that it has. The State has no

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Stats." R.61 at 17. This ruling certainly appears to encompass NSWM's sec. 1983 claim based on the effective siting and formal rulemaking aspects of Wisconsin's solid waste legislation. However, the district court did not enter judgment with respect to these claims until after the bench trial. The court's December 29, 1994 order, entered following the bench trial, provided that judgment be entered that the rulemaking requirement in the final sentence of sec. 159.11(1), Wis. Stats., and the effective siting requirement found at section 159.12(3), Wis. Stats. violate the Commerce Clause of the United States Constitution and are invalid, and dismissing the remaining claims in plaintiffs' complaint with prejudice R.81. The district court erred in dismissing NSWM's sec. 1983 claim as it related to the "effective siting" and "formal rulemaking" provisions of the Wisconsin statute; its decision that these provisions violated the Commerce Clause entitled NSWM to sec. 1983 relief. See Higgins, 498 U.S. at 451.

legitimate interest in requiring that out-of-state generators conform to the Wisconsin plan when those entities are not going to transport the waste to Wisconsin. As we have just noted, Wisconsin has other means to protect its legitimate environmental interests. On the other hand, the burden on the out-of-state generator is substantial. The interstate generator and hauler must abide by Wisconsin rules even if the product is not bound for that State, if there are conflicting regulations in other jurisdictions, or if there is a more efficient and cost-effective method of transporting the waste. Accordingly, we conclude that the Wisconsin plan imposes a very significant burden on interstate commerce, a burden that far outweighs the permissible benefits that Wisconsin, as a member of the federal union, has a right to expect.

Conclusion

For the foregoing reasons, the judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1995

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,	]	Appeal from the United States District Court for the Western District of Wisconsin.
Plaintiff-Appellants,	]	
Nos. 94-4006 and 95-1058 v.	]	No. 94 C 603. John C. Shabaz, Judge.
GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,	]	
Defendant Appellee.	]	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on September 6, 1995 by defendant-appellee, no judge in active service has requested a vote thereon, and all the judges on the

original panel have voted to deny the petition, Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs,

v.

MEMORANDUM AND ORDER
94-C-603-S

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants.

The plaintiff National Solid Wastes Management Association and three of its members seek a declaration that several provisions of Wisconsin's solid waste management statute violate the Commerce Clause of the United States Constitution. Jurisdiction is based on 28 U.S.C. 1331. The matter is presently before the Court on cross-motions for summary judgment.

BACKGROUND

In 1989 Wisconsin adopted legislation to manage the flow of solid waste into its landfills. Its major provision forbids disposal of enumerated recyclable materials at Wisconsin landfills. Wis. Stat. § 159.07.

This prohibition does not apply, however, to solid waste generated in a municipality[12] that has an "effective recycling program," defined by Wisconsin law as a program of mandatory recycling for all entities in the municipality enforceable by local ordinance. Wis. Stat. § 159.11.

The Wisconsin Department of Natural Resources is authorized to administer the law and promulgate rules necessary to its implementation. Pursuant to its authority, the department reviews proposed recycling programs of municipalities to determine whether they meet the definition of an effective recycling program. Only for out-of-state municipalities is the department obligated to promulgate its approval by formal rule which imposes additional procedural requirements including a public hearing. Wis. Stat. § 159.11(l).

Wisconsin law also prohibits acceptance of out-of-state solid waste unless the state in which the waste was generated has an "effective siting program." Wis. Stat. § 157.07(7)(a). An effective siting program exists only if the state has sited new solid waste disposal capacity in the previous four years which exceeds the amount of solid waste generated in those years. Wis. Stat. § 159.12(3). Of the four states which border Wisconsin, Michigan has an effective siting program although both Illinois and

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[12] As used throughout this Memorandum and Order "municipality" refers to a general purpose unit of local government which is the basis for applying the law to out-of-state residents. See Wis. Stat. § 159.01(5). Although the statute makes certain distinctions concerning Wisconsin governmental units, these distinctions are not relevant for purposes of the constitutional analysis of this memorandum and order.

Minnesota have per capita disposal capacity greater than that of Wisconsin.

The interstate market for solid waste in Wisconsin and its neighboring states is limited almost exclusively to the importation of waste from out-of-state communities near the border of the importing state. Landfills and incinerators tend to serve surrounding regional wastesheds regardless of state borders. Consequently, virtually all of Wisconsin's imported solid waste comes from counties that border Wisconsin.

Municipalities in the relevant geographic area vary widely in the degree of control they assert over locally generated waste. Some municipalities collect and transport all locally generated solid waste or contract with third parties for waste disposal. Many collect or contract for the collection of residential waste requiring commercial and industrial entities to contract privately for waste disposal. Others leave all waste disposal to private contractual arrangements. Because of these varying degrees of control it is common for communities near the Wisconsin border to dispose some waste in Wisconsin and some in a bordering state.

MEMORANDUM

This case requires the court to address the ongoing tension between a state's interest to protect its environment and preserve scarce local resources and the nation's interest embodied in the Commerce Clause of the United States Constitution to preserve the free flow of commerce between the states. It is clear that Wisconsin has the right to preserve its landfill space by restricting the flow of waste into its landfills. *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). It may not do so, however,in a manner which discriminates against or unduly burdens interstate commerce. *Id.* Plaintiffs and

defendant each seek summary judgment on the constitutionality of the challenged statute.

Plaintiffs contend that the effective siting and rulemaking provisions of the Wisconsin statute facially discriminate against interstate commerce and that the effective recycling provision is discriminatory in a practical effect. Furthermore, plaintiffs assert that numerous less burdensome alternatives are available to Wisconsin to remove recyclables from the waste stream entering Wisconsin's landfills. Defendant argues that Wisconsin law, particularly the effective recycling provision, is neutral towards interstate commerce both facially and in practical effect and that any burden imposed upon interstate commerce is amply justified by the state's legitimate interest in preserving landfill space and protecting its environment.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

The United States Supreme Court has established a two-tiered method for evaluating Commerce Clause challenges of state regulation. State statutes which affirmatively discriminate against interstate commerce either on their face or in practical effect are subject to heightened scrutiny. Such statutes withstand constitutional challenge only if the state can demonstrate that the statute serves a legitimate local purpose and that this purpose could not served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 139 (1986). Statutes which do not discriminate but have only an incidental effect on interstate commerce are deemed valid unless "the burden imposed upon commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Because of the substantial difference in these two approaches the initial and often determinative inquiry in a commerce clause challenge is the appropriate level of scrutiny to apply. This inquiry was concisely summarized in *Philadelphia v. New Jersey*, 437 U.S. at 624:

> The critical inquiry, therefore, must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

The court now examines each of the challenged provisions under these standards.

Effective Recycling Program

The effective recycling program requirement clearly does not facially discriminate against interstate commerce. It requires a municipality, regardless of its location in or out-of-state, to adopt a mandatory recycling

program before disposing of any of its solid waste in Wisconsin landfills. Plaintiffs advance no real argument that the statute facially discriminates. Accordingly, the issue concerning this provision is whether the effect of the statute is to advantage in-state economic interests relative to out-of-state market participants. *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

There are several ways that a state law can economically benefit in-state interests and economically burden interests of those in other states. First, a state statute may favor local consumers by preserving scarce resources for their use or making access to local resources by out-of-state residents relatively more difficult or costly. This type of discrimination is most common among statutes restricting the flow of solid waste. *Philadelphia v. New Jersey*, 437 U.S. 617 (striking down a statute which erected a nearly total barrier to out-of-state access to scarce New Jersey landfills.) *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S.Ct. 1345 (1994) declaring invalid a statute which facially discriminated by imposing a higher fee on out-of-state waste to be disposed in Oregon. *Government Suppliers Consolidating Servs. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (holding backhaul restriction discriminatory in practical effect because it substantially raised the cost of disposing of out of state solid waste in Indiana while leaving unaffected the cost of the disposal of in-state waste.)

An examination of the practical effects of the Wisconsin statute does not reveal discrimination against out-of-state interests but shows instead that Wisconsin consumers are more heavily burdened by the statute than are their out-of-state neighbors. For the vast majority of Wisconsin municipalities and the citizens residing therein, the only economically reasonable choice for disposal of solid waste is in a Wisconsin landfill. Accordingly, Wisconsin municipalities not located near the state border -

are virtually compelled to bear the full burden of the mandatory recycling program in order to dispose of their solid waste. Municipalities outside Wisconsin who choose to dispose of their waste in Wisconsin bear the identical burden. Accordingly, as between these two types of municipalities, there is no discrimination in favor of Wisconsin interests.

However, out-of-state municipalities frequently have alternatives more economical than disposing their waste in Wisconsin because they may choose to dispose their waste in another state which does not impose the substantial economic burden of the mandatory recycling program. Accordingly these municipalities enjoy a method of avoiding the economic burden of the mandatory recycling program which is unavailable to centrally located Wisconsin residents and bear a relatively smaller share of the burden of Wisconsin's mandatory recycling requirement. Viewed in this way it is clear that while the effect of Wisconsin's statute may be to reduce the flow of out-of-state waste into Wisconsin, that fact does not support a finding of discrimination. It merely reflects the fact that out-of-state consumers who have more economical alternatives are likely to avoid the additional disposal costs which Wisconsin has imposed upon its own residents to reduce the flow of waste into its landfills. The overall effect of Wisconsin's method to limit the flow of solid waste into its landfills is to impose a burden upon its own residents which is equal to or greater than the burden imposed upon out-of-state consumers.

Plaintiffs' assertion that the statute practically discriminates against out-of-state interests because of financial and technical assistance offered exclusively to Wisconsin municipalities is without merit. Concerning the availability of financial assistance it is undisputed that all funds to be so applied are raised by a tax surcharge imposed exclusively upon Wisconsin residents. The combined effect is therefore completely neutral to out-

of-state interests. It is also undisputed that Wisconsin's "Counsel of Recycling" is not a source of technical assistance for Wisconsin municipalities and that the Wisconsin Department of Natural Resources provides assistance to out-of-state as well as in-state municipalities. Accordingly, there is no apparent basis to find practical discrimination based upon discriminatory assistance to Wisconsin municipalities.

A second way that statutes discriminate in favor of local economic interests is to restrict access of foreign suppliers to local markets, thereby benefitting local providers of goods and services. Such a statute was declared invalid by the Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1677 (1994). *Carbone* considered a flow control ordinance which required that all solid waste generated in the town of Clarkstown be processed by a local, publicly financed waste processor. The effect of this ordinance was to block access to the market for processing solid waste to out-of-state competitors who wished to provide that service. *Id.* at 1681. Similarly, the statute declared invalid in *Government Suppliers* restricted access of out-of-state waste haulers by imposing a backhaul prohibition which impacted only upon out-of-state operators. 975 F.2d at 1279. Such discriminatory statutes which have the effect of protecting local commercial entities have routinely been struck down as violative of the Commerce Clause. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (precluding import of milk from-states without a reciprocal agreement with Mississippi); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (granting sales tax credit only for ethanol produced in Ohio or in a state which grants a similar tax advantage).

The Wisconsin effective recycling program requirement does not benefit in-state commercial entities at the expense of out of state competitors. In fact, as illustrated by the plaintiffs in this case, the adverse

impact of the statute falls principally upon Wisconsin providers of services. Each of the three corporate plaintiffs in this case are owners of landfills in Wisconsin who profit by providing disposal services for waste generated out-of-state. It is clear that the effect of Wisconsin's statute will be to benefit plaintiffs' out-of-state competitors who may gain solid waste disposal business at the expense of the Wisconsin providers. The statute is therefore the antithesis of one which discriminates against interstate commerce.

Plaintiffs' reliance upon language in *New Energy Co.* and *Cottrell* relating to the impermissibility of precluding imports based upon another state's laws is misplaced in this case for at least two reasons. First, in both *New Energy Co.* and *Cottrell* the statutes had the effect of benefitting local commercial entities at the expense of their out-of-state competitors by the construction of barriers to entry. In contrast, the statute in this case benefits interstate commerce at the expense of Wisconsin consumers and commercial entities. Since the critical inquiry in all cases is whether the statute discriminates against interstate commerce, it is clear that statements concerning out-of-state law cannot be taken out of context to strike down the statute which does not so discriminate.

Second, the Wisconsin statute does not condition access to Wisconsin landfills upon the adoption of a state statute. It is directed to government entities which are direct participants in the waste disposal marketplace as decisionmakers concerning management of waste generated in their jurisdictions. For this reason, Wisconsin's insistence upon an ordinance mandating recycling prior to the acceptance of waste generated within a municipality is not analogous to the statutes considered in *New Energy* and *Cottrell* which conditioned access to local markets on state law.

Price affirmation statutes, which directly regulate the price of goods sold in-state for the benefit of local consumers, are a third type of regulation held discriminatory by the United States Supreme Court. *Healy v Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers*, 476 U.S. 573 (1986). These statutes generally involve the requirement that in-state prices of wholesale products be no higher than prices offered in other states. The effect of such a statute is to discriminate in favor of local purchasers and to affect the ability of sellers to adjust their prices in other states. Plaintiffs seek to analogize these cases to the present case asserting that Wisconsin's municipal-wide mandatory recycling program requirement regulates out-of-state commerce in the same way as did price affirmation statutes.

The Court finds this analogy inappropriate. Initially and most fundamentally the Wisconsin waste management statute does not discriminate in favor of in-state residents like the price affirmation statutes. The preference for local consumers at the expense of out-of-state consumers is the essential reason that price affirmation statutes are constitutionally invalid. *Brown-Forman*, 476 U.S. at 580.

Furthermore, this statute does not directly regulate commercial transactions as do price affirmation statutes. Municipalities which adopt a mandatory recycling program are free to contract at whatever price they please for the disposal of the treated waste. As a result, transactions with out of state waste management companies are in no way directly regulated by the statute. The burden imposed upon out of state municipalities and their residents is more analogous to the burden imposed upon milk bottlers in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). In *Clover Leaf Creamery* Minnesota adopted a statute banning the sale of milk in plastic containers. The effect of the statute was to impose a restriction upon out-of-state dairies who previously used

plastic jugs to sell their product. One of the potential effects of the statute was that some out-of-state producers would be compelled by production practicalities to use non-plastic containers even for the sale of milk outside Minnesota. Yet the Supreme Court determined that the statute was not practically discriminatory because of this burden imposed upon interstate commerce but was instead subject to the *Pike* balancing test. 449 U.S. at 472.

In conclusion, an analysis of the Wisconsin statute in light of the undisputed nature of the interstate market in waste which will be affected by it clearly establishes that the statute is not discriminatory on its face or in effect against interstate commerce. The statute is therefore constitutionally valid unless the incidental burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

The principal burdens upon interstate commerce imposed by the statute result from the detailed nature and municipal-wide imposition of the Wisconsin effective recycling program requirement. As a result of this requirement, out-of-state municipalities which transport only some of their waste to Wisconsin landfills will experience an increased cost even as to that waste not disposed in Wisconsin. Furthermore, municipal residents may have their choices restricted based upon the decision of the municipality not to adopt a recycling program in compliance with Wisconsin law. Several fact issues preclude balancing these burdens against the benefits to Wisconsin on summary judgment.

First, factual disputes remain concerning the extent of the burden imposed upon out-of-state communities. It is not clear how many out-of-state communities transport only part of their waste to Wisconsin. The extent of the burden of Wisconsin's

mandatory recycling program is also unclear, particularly since the amount of financial burden is affected by the current market for the sale of recyclable products generated by the program. In addition, the feasibility and availability of alternatives to a municipal-wide recycling program are vigorously contested. Such issues are inherently factual in nature and require full factual development. *See Maine v. Taylor*, 477 U.S. at 146 (feasibility of baitfish presents issue of fact).

Additional Procedural Requirements

The requirement in Wisconsin Statutes section 159.11 that only out of state municipalities are required to have their effective recycling programs approved by formal rulemaking process is facially discriminatory. Like the surety bond requirement imposed upon out-of-state truckers in *Government Suppliers*, 975 F.2d at 1285, it is an additional requirement imposed only upon out of state municipalities. Therefore, the provision must be found unconstitutional "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. at 274. Defendant makes no attempt to justify the distinction in treatment between Wisconsin and out-of-state municipalities. His only response to plaintiffs' challenge is to assert that the additional burden upon out of state municipalities is insubstantial. A facially discriminatory statute, even one which does not impose a large burden upon out-of-state interests, cannot be found constitutional absent some justification for its existence. 975 F.2d at 1285. Accordingly, the statutory requirement that an out-of-state municipality's effective recycling program be approved by a formal rulemaking process is unconstitutional and invalid.

Plaintiffs suggest that the invalidity of the procedural requirement necessarily invalidates the entire effective waste recycling program requirement since the

challenged provisions are so closely related that they are not severable. The determination of severability is an issue of state law. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 803 (1992). The general rule under Wisconsin law is set forth at 990.001(11), Wis. Stats.:

> If any provision of the statutes or of a section law is invalid, or if the application of either to any person or circumstances invalid, such invalidity shall not effect other provisions or applications which can be given affect without the invalid provision or application.

This rule is applicable unless its application would "produce a result inconsistence with the manifest intent of the legislature." *Burlington Northern, Inc. v. Superior*, 131 Wis.2d 564, 580, 388 N.W.2d 916 (1986).

There is nothing to suggest that the Wisconsin legislature did not intend to apply the general rule in this case. In fact, while the effective recycling program remained virtually the same throughout the legislative process, the additional rulemaking requirement was added by amendment without discussion. Given the relative importance placed upon the effective recycling program, it is unlikely that the Wisconsin legislature intended its continuing enforcement to be contingent upon the validity of a rulemaking procedure, which admittedly has little impact upon the application of the law. Accordingly, the Court concludes that the invalidity of the rulemaking procedure requirement does not affect the validity of the effective recycling program itself.

Effective Siting Requirement

As with the rulemaking requirement the effective siting requirement is facially discriminatory against out-of-state interests because it imposes a requirement upon

them which Wisconsin does not impose upon its own residents. Indeed, because the effect of the provision is to impose a practically complete ban on the importation of solid waste, it is similar to the provision struck down in *Philadelphia v. New Jersey*.

Defendant provides scant justification for this glaring discrimination other than a general incantation of its desire to slow the consumption of its landfill space. While the Supreme Court recognized this as a legitimate goal, it also found that the goal could not be pursued by discriminatory means such as those employed by the Wisconsin statute. 437 U.S. at 626-27. Furthermore, since most of Wisconsin's bordering states have per capita landfill capacity greater than Wisconsin's, there would appear to be no justification for a rule which bans importation of waste based upon the relative availability of landfill space. The effective siting requirement is plainly a facially discriminatory statute with virtually no justification beyond that of economic protectionism for Wisconsin residents. It is clear, however, that the effective siting requirement is also severable from the statute so that its invalidity does not affect the validity of the effective recycling program requirement.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED as it concerns the rulemaking requirement found in the final sentence of section 159.11(1), Wis. Stats., and the effective siting requirement found at section 159.12(3), Wis. Stats.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is DENIED in all other respects.

IT IS FURTHER ORDERED that defendant's judgment is DENIED.

Entered this 15th day of December, 1994.

BY THE COURT:

/s/ John C. Shabaz
John C. Shabaz
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs,

v.

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants.

MEMORANDUM AND ORDER
94-C-603-S

The plaintiff National Solid Wastes Management Association and three of its members seek a declaration that several provisions of solid waste management statute violated the Commerce Clause of the United States Constitution. On December 15, 1994, this Court entered a Memorandum and Order determining that certain portions of that law known as the "effective siting program" and "rulemaking" requirements were violative of the Commerce Clause, but that the portion of the law known as the "effective recycling program" requirement did not affirmatively discriminate against interstate commerce either on its face or in practical effect. Accordingly, the Court determined that the sole remaining

issue of fact was whether the effective recycling program requirement imposed a burden upon commerce which was "clearly excessive in relation to the putative local benefits."

That issue was tried to the Court on December 21 and 22, 1994. At the conclusion of the trial the Court made certain oral findings of fact and conclusions of law determining that the effective recycling program provision of the Wisconsin Statute did not violate the Commerce Clause and reserving the opportunity to supplement those findings of fact and conclusions of law by written memorandum. The Court now issues that supplemental memorandum clarifying and completing its remarks from the bench.

The precise issue considered by the Court at trial is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 at 142:

> Where the statute regulates evenhandedly to effectuate legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

(Citations omitted.) This test requires the Court to make findings of fact in three basic areas: (1) The extent of the burden on interstate commerce; (2) The nature and extent of Wisconsin's interest advanced by the statute and; (3) The availability of alternatives which could achieve the

same benefits with a lesser impact on interstate commerce.

FINDINGS OF FACT

Burden on Commerce

The overall amount of interstate commerce which is impacted by the Wisconsin Statute is small. Only 4.8% of waste disposed on Wisconsin landfills is generated in another state. All of the imported waste is generated by communities located near the Wisconsin Border in Illinois, Iowa or Minnesota. Twenty-five percent of the out-of-state waste presently entering Wisconsin is unaffected by the law. As a result, the interstate component of Wisconsin's waste stream which is affected by the statute amounts to approximately only 3.6%.

Eleven out-of-state communities near the Wisconsin border have submitted effective recycling programs to the Wisconsin Department of Natural Resources, and each of these programs has been approved. The evidence presented at trial established that only about 20 communities near the Illinois or Minnesota border which presently dispose some of their community's waste in the State of Wisconsin would be adversely affected by the statute. Furthermore, most of these communities already have recycling mechanisms in place, including curbside recycling pickup of the recyclable items encompassed by the Wisconsin law. As a result the additional costs to these communities to adopt a Wisconsin program would be minimal, chiefly in the nature of administrative costs to enact an ordinance and file reports with the State of Wisconsin. The greatest number of communities presently disposing part of their waste in Wisconsin are near the southeastern border of Wisconsin in Lake and McHenry Counties, Illinois.

The principal reason that these Illinois communities have declined to submit recycling plans for Wisconsin approval appears to be the existence of the effective siting program and rulemaking requirements which this Court has previously declared unconstitutional. Specifically, the Board of Directors of The Solid Waste Agency of Lake County, Illinois transmitted to the Governor of the State of Wisconsin on April 12, 1994 a resolution of its Board of Directors which provided in part:

> WHEREAS, this agency is formed from 35 Lake County cities and villages representing 92% of Lake County's total population and the County of Lake; and
>
> WHEREAS, this agency strongly supports the concept of waste reduction and minimizing the amount of material going to landfill; and
>
> WHEREAS, at least nine member communities - have contracts or rely on the Pheasant Run Landfill in Bristol, Wisconsin for their waste disposal; and
>
> WHEREAS, the Waste Ban Law requires that waste entering Wisconsin from an out-of-state unit must originate in a state which has an "effective siting" program; and
>
> WHEREAS, the Wisconsin Department of Natural Resources (the DNR) has determined that Illinois does not have an "effective siting" program; and
>
> WHEREAS, the Wisconsin Waste Ban Law requires that an out-of-state unit must comply with an Administrative Rules procedure which, among other things, includes a review by both houses of the Wisconsin Legislature that is not required for Wisconsin communities;

. . .

NOW, THEREFORE, BE IT RESOLVED by this Board of Directors of the Solid Waste Agency of Lake County, Illinois that:

1. The Executive Director shall not submit documents certifying that member communities have an effective recycling program because of the provisions for an effective landfill siting program and the Administrative Rules process.

The letter accompanying the resolution urges the Wisconsin Legislature "to reconsider the arbitrary out-of-state provisions of this, otherwise, well intentioned law." Based upon this letter it is apparent that the adoption of a Wisconsin effective recycling program, absent the discriminatory effective siting program and rulemaking provisions, is not considered to be a substantial burden by the affected communities.

The evidence at trial also established that the net cost to a community to operate a recycling program is insubstantial. Specifically, the costs to collect and process recyclable materials is fully offset by proceeds from the sale of such materials and by a reduction in tipping fees and equipment requirements as a result of reduced volume of landfill waste.

Notwithstanding the small burden imposed by the effective recycling program requirement, certain communities are unlikely to adopt such a program for political reasons. As a result, certain private commercial waste generators who presently contract with haulers who dispose of waste in Wisconsin will be denied the option of Wisconsin disposal. Apart from two examples presented at trial, the evidence did not establish how many entities would be so affected. Neither did the evidence establish that such commercial entities would incur any additional

cost as a result of the restriction. Based upon the apparent willingness to adopt an effective recycling program after removal of the effective siting and procedural barriers, it cannot be determined that a substantial amount of interstate commerce would be impacted by the law.

Advancement of Wisconsin Interests

It was generally undisputed at trial that Wisconsin has an interest in reducing the flow of recyclable materials into its landfills and that Wisconsin realizes substantial benefits from such a reduction. These benefits include: Conserving landfill space, reducing the risk of environmental contamination and remediation costs by siting fewer new landfills, reducing the risk of environmental contamination and remediation costs from landfilling certain listed recyclable materials, conservation of raw materials and natural resources, conservation of energy and resources used to manufacture products from raw materials rather than from recyclable materials and stimulation of new markets and technologies for recyclable materials.

Available Alternatives

The evidence established that community-wide mandatory recycling is likely to result in the removal of the greatest amount of recyclable materials from the waste stream. Furthermore, the evidence presented by plaintiffs did not establish that the same result could be achieved as effectively or cheaply by available alternatives. Specifically, inspection and reporting was likely to be ineffective and imposed a substantially greater cost upon Wisconsin and its landfill consumers than the existing recycling program requirements. Furthermore, the absence of any effective means to objectively compare the effectiveness of programs make a system of reporting and inspection infeasible. Hauler certification was not

established as a viable alternative because of inherent economic pressures imposed upon a service provider who is also serving the role as regulator of its customers. Finally, the alternative of regulating different segments of the same community separately is nearly as intrusive as the present requirement and was not established as an equally effective alternative because the effectiveness of a recycling program is adversely impacted by varying standards of behavior for different segments in the same community.

CONCLUSIONS OF LAW

The burdens imposed on interstate commerce by the Wisconsin effective recycling program requirement were not shown to be substantial either in terms of the extent of interstate commerce affected or the additional costs imposed upon out-of-state consumers and commercial entities. Furthermore, the evidence established *that* any impacts will probably decline as a result of the finding of invalidity of the effective siting and rulemaking provisions.

The substantial benefits to the State of Wisconsin from the law are undisputed and these benefits cannot be achieved as effectively with any alternative which would have a reduced impact on interstate commerce.

The minimal burden on interstate commerce established at trial does not clearly outweigh the benefits to Wisconsin of extending its law to out-of-state communities.

ORDER

IT IS ORDERED that judgment be entered that the rulemaking requirement in the final sentence of Section 159.11(i), Wis. Stats., and the effective siting requirement at Section 159.12(3), Wis. Stats., violate the

Commerce Clause of the United States Constitution and are invalid, and dismissing the remaining claims in plaintiffs' complaint with prejudice.

IT IS FURTHER ORDERED that plaintiff's motions for temporary injunctive relief pending appeal are denied for those reasons stated from the bench.

Entered this 29th day of December, 1994.

BY THE COURT:

/s/John C. Shabaz
JOHN C. SHABAZ
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs,

v.

JUDGMENT IN A CIVIL CASE
94-C-603-S

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants.

This action came for consideration before the court with District Judge John C. Shabaz presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered that the rulemaking requirement in the final sentence of Section 159.11(1), Wis. Stats., and the effective siting requirement at Section 159.12(3), Wis. Stats., violate the Commerce Clause of the United States Constitution and are invalid, and

dismissing the remaining claims in plaintiffs' complaint with prejudice.

Approved as to form this 29th day of December, 1994.

/s/ John C. Shabaz
John C. Shabaz
District Judge

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

Dec 30 1994
Date

Wisconsin Statute 159.07 (1993-94) provides in relevant part:

Prohibitions on land disposal and incineration.
(1m) Batteries, major appliances and oil. No person may:

(a) Dispose of a lead acid battery or a major appliance in a solid waste disposal facility in this state, except that a person may dispose of a microwave oven in a solid waste disposal facility in this state if the capacitor has been removed and disposed of in accordance with s. 144.79 (7), if applicable.

(am) Burn a lead acid battery or a major appliance in a solid waste treatment facility in this state.

(b) Dispose of waste oil in a solid waste disposal facility or burn waste oil without energy recovery in a solid waste treatment facility in this state.

(2) Yard waste. Beginning on January 3, 1993, no person may dispose of yard waste in a solid waste disposal facility, except in a land spreading facility approved in accordance with ss. 144.43 to 144.47, or burn yard waste without energy recovery in a solid waste facility in this state.

(3) General disposal restrictions. Beginning on January 1, 1995, no person may dispose of in a solid waste disposal facility or burn without energy recovery in a solid waste treatment facility in this state any of the following:

(a) An aluminum container.

(b) Corrugated paper or other container board.

(c) Foam polystyrene packaging.

(d) A glass container.

(e) A magazine or other material printed on similar paper.

(f) A newspaper or other material printed on newsprint.

(g) Office paper.

(h) A plastic container.

(i) A steel container.

(j) A waste tire, as defined in s. 84.078 (1) (b).

(k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.

(4) General incineration restrictions. Beginning on January 1, 1995, no person may convert into fuel or burn with energy recovery at a solid waste treatment facility in this state any of the following:

(a) An aluminum container.

(b) Corrugated paper or other container board.

(c) Foam polystyrene packaging.

(d) A glass container.

(f) A magazine or other material printed on similar paper.

(g) A newspaper or other material printed on newsprint.

(h) Office paper.

(i) A plastic container.

(j) A steel container.

(k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.

(7) Exceptions. (a) The prohibitions in subs. (3) and (4) do not apply with respect to solid waste, except medical waste, as defined in par. (c) 1. cg., that is generated in a region that has an effective recycling program, as determined under s. 159.11, and, if the region is not in this state, the region is located in a state that has an effective siting program, as determined under s. 159.12.

(b) 1. In this paragraph:

a. "Current service area" means the area served by a solid waste treatment facility under a contract that is in effect on January 1, 1993, and has a term of at least one year.

b. "Operating solid waste treatment facility" means a solid waste treatment facility that has an operating permit or license issued under s. 144.391 or 144.44 (4) prior to May 11, 1990, except for a medical waste incinerator, as defined in par. (c) 1. cr.

2. A prohibition in sub. (3) (b), (c), (e), (f), (g), (h) or (j) or (4) (b), (c), (f), (g), (h) or (i) does not apply to a person who converts into fuel or burns at an operating solid waste treatment facility a type of material identified in one of those paragraphs that was converted into fuel or burned at the operating solid waste treatment facility during April, 1990, and either is generated in the operating solid waste treatment facility's current service area or is generated by the owner of the operating solid waste treatment facility.

(bg) The prohibitions in subs. (1m) to (4) do not apply to a person who burns solid waste at a facility that uses solid waste as a supplemental fuel if less than 30% of heat input to the facility is derived from the solid waste burned as supplemental fuel.

(c) 1. In this paragraph:

a. "Clinic" means a place, other than a residence, that is used primarily for the provision of nursing, medical, podiatric, dental, chiropractic, optometric or veterinary care and treatment.

b. "Hospital" has the meaning given in s. 50.33 (2).

c. "Infectious waste" means solid waste that contains pathogens with sufficient virulence and in sufficient quantity that exposure of a susceptible human or animal to the solid waste could cause the human or animal to contract an infectious disease.

cg. "Medical waste" means containers, packages and materials identified under sub. (3) or (4) that contain infectious waste or that are from a treatment area and are mixed with infectious waste.

cr. "Medical waste incinerator" means a solid waste treatment facility that primarily burns infectious waste and other waste that contains or may be mixed with infectious waste.

d. "Nursing home" has the meaning given in s. 50.01 (3).

e. "Treatment area" means a room or area in a hospital or clinic the primary use of which is to provide emergency care, diagnosis or radiological treatment; an

obstetrics delivery room in a hospital, other than a patient's room; or a room or area in a hospital, clinic or nursing home, identified by the department by rule, in which infectious waste is generated.

2. The prohibitions in subs. (3) and (4) do not apply with respect to any of the following:

a. The burning of medical waste in a medical waste incinerator or other incinerator approved by the department to accept and burn medical waste, except as provided in subd. 3.

b. The disposal of, in a solid waste disposal facility, a container, package or material identified under sub. (3) or (4) that contained infectious waste or that is from a treatment area and is mixed with infectious waste generated in the treatment area, if the container, package or material has been treated, pursuant to standards established under ss. 144.43 to 144.47, to render the infectious waste noninfectious.

3. A person may not burn medical waste at a medical waste incinerator unless the person complies with s. 144.382 (1), if applicable, and obtains from each generator of the medical waste a copy of the policies under sub. (8) (a) and the annual assessment under sub. (8) (b).

(d) The department may grant, to a responsible unit, an exception to a prohibition in sub. (3) or (4) for up to one year for a material identified in sub. (3) or (4) in the event of an unexpected emergency condition.

(e) The department may grant a waiver to the prohibition in sub. (2) to allow the burning of brush or other clean woody vegetative material that is no greater than 6 inches in diameter at wood burning facilities that are licensed or permitted under ch. 144 under conditions established by the department relating to the feasibility of complying with the prohibition in sub. (2).

(8) Medical waste source reduction policy. (a) A generator of medical waste that sends waste to a medical waste incinerator shall develop policies concerning reduction of medical waste, as defined in sub. (7) (c) 1. cg., including all of the following:

1. Education and training of staff.

2. Alternatives, including sterilization, to the use of disposable equipment.

3. An annual assessment of the medical waste source reduction policy.

(b) The generator shall submit the source reduction policy and the annual assessment to the operator of the medical waste incinerator.

(c) The operator of the medical waste incinerator shall retain a copy of the source reduction policy and the annual assessment and provide it to the department upon request. The department may analyze and disseminate the information that it obtains under this paragraph.

(d) The department may charge a fee for the analysis of a source reduction policy and assessment.

Wisconsin Statute 159.09 provides (1993-94) in relevant part:

Municipal and county duties and powers.

(1) Designation of responsible units. (a) Except as provided in pars. (b) to (d), each municipality is a responsible unit.

(b) A county board of supervisors may adopt a resolution designating the county a responsible unit. Except as provided in pars. (c) and (d), a county that has adopted such a resolution is the responsible unit for the entire county.

(c) Within 90 days after the county board of supervisors adopts a resolution under par. (b), the governing body of a municipality that is located in part or in whole in the county may adopt a resolution retaining the municipality's status as a responsible unit.

(d) The governing body of a responsible unit designated under par. (a), (b) or (c) may by contract under s. 66.30 designate another unit of government, including a federally recognized Indian tribe or band in this state, or a solid waste management system created under s.

59.07 (135) to be the responsible unit in lieu of the responsible unit designated under par. (a), (b) or (c). The contract shall cover all functions required under sub. (2), including provisions for financing and enforcing the recycling or other solid waste management program.

(e) The governing body of a county that adopts a resolution under par. (b) or enters into a contract under par. (d) shall submit a copy of the resolution or contract to the department and to the clerk of each municipality in the county, within 30 days after adoption of the resolution or the signing of the contract. The governing body of a municipality that adopts a resolution under par. (c) or enters into a contract under par. (d) shall submit a copy of the resolution or contract to the department and to the clerk of the county in which the municipality is located, within 30 days after adoption of the resolution or the signing of the contract.

(2) Duties. Each responsible unit shall do all of the following:

(a) Develop and implement a recycling or other program to manage the solid waste generated within its region in compliance with s. 159.07 (1m) to (4) and the priorities under s. 159.05 (12).

(b) Submit to the department by January 1, 1993, a report setting forth how the responsible unit intends to implement its program under par. (a), as it relates to the requirements of s. 159.07 (3) and (4). The report shall specify all of the following:

1. Whether the responsible unit or another person designated under sub. (3) (a) will implement each component of the program under par. (a).

2. The procedures or processes that the responsible unit intends to use to separate, collect, store, process and market solid waste or components of solid waste and to educate the public on the program.

2m. The procedures or processes that the responsible unit intends to use to manage solid waste that is not separated for recovery or recycling, consistent with the priorities under s. 159.05 (12).

3. A schedule for the implementation of the program.

(c) Provide information requested by the department on the status of the implementation of the program under par. (a).

(3) Powers. A responsible unit may do any of the following:

(a) Designate one or more other persons to implement specific components of the program under sub. (2) (a), if the designated person consents to the designation.

(b) Adopt an ordinance to enforce the program established under sub. (2) (a). The ordinance may include a schedule of forfeitures to be imposed for violations of that ordinance. The ordinance may authorize the responsible unit or person designated under par. (a) to refuse to accept solid waste at the recycling facility or site if the solid waste is a container for a nonhousehold pesticide, as defined in s. 94.68 (3) (a) 2., is contaminated or is otherwise in a condition that makes recycling infeasible. The ordinance may require a person to use a facility for the recycling of solid waste or for the recovery of resources from solid waste, as defined in s. 159.13 (1) (d), only as provided under s. 159.13.

Wisconsin Statutes 159.11 (1993-94) provides in relevant part:

Effective recycling programs.

(1) Department review. Upon request of a responsible unit or an out-of-state unit, the department shall review documentation of the responsible unit's solid waste management program created under s. 159.09 (2) (a) or the out-of-state unit's solid waste management program and determine whether the program is an effective recycling program. The department shall complete its review and make a determination within 90 days after receiving the documentation. The department

shall promulgate, by rule, its determination that an out-of-state unit's solid waste management program is an effective recycling program.

(2) Effective program criteria for responsible units. A responsible unit's solid waste management program is an effective recycling program if it includes all of the following:

(a) A public education component to inform residents of the region of the reasons to recycle, local opportunities to recycle and the prohibitions in s. 159.07 (3) and (4).

(b) A requirement that the occupants of single-family residences, buildings containing 2 or more dwelling units and commercial, retail, industrial and governmental facilities in the region either separate the materials identified in s. 159.07 (3) and (4) from postconsumer waste generated in the region or treat that postconsumer waste at a facility that will recover those materials from solid waste in as pure a form as is technically feasible, except that this paragraph does not apply to postconsumer waste burned at a facility described in s. 159.07 (7) (bg).

(c) A requirement that owners of buildings containing 5 or more dwelling units in the region do all of the following if postconsumer waste generated in those buildings is not treated at a facility that will separate the materials identified in s. 159.07 (3) and (4) from that postconsumer waste:

1. Provide adequate, separate containers for the program established under par. (b).

2. Notify tenants at the time of renting or leasing the dwelling and semiannually thereafter of the programs under this paragraph and par. (b).

3. Provide for the collection of recyclable materials separated from solid waste by the tenants and the delivery of the recyclable materials to a recycling facility.

(d) A requirement that owners of commercial, retail, industrial and governmental facilities in the region do all of the following if postconsumer waste generated in

those buildings is not treated at a facility that will separate the materials identified in s. 159.07 (3) and (4) from that postconsumer waste:

1. Provide adequate, separate containers for the program established under par. (b).

2. Regularly notify all users and occupants of the facilities of the programs under this paragraph and par. (b).

3. Provide for the collection of recyclable materials separated from solid waste by the users and occupants and the delivery of the recyclable materials to a recycling facility.

(dm) Beginning in 1997, a system of volume-based solid waste fees to generate revenue equal to the responsible unit's costs for solid waste management other than those reimbursed by the state. This criterion does not apply to any responsible unit that separates for recycling at least 25% by volume or by weight of the solid waste collected within the region by the responsible unit or by any person under contract with the responsible unit. This criterion does not apply to a responsible unit that provides solid waste to an operating solid waste treatment facility, as defined in s. 159.07 (7) (b) 1. b., under a contract that was in effect on January 1, 1993.

(e) A system for collecting from single-family residences in the region any materials separated pursuant to par. (b).

(em) A system for the processing and marketing of recyclable materials collected by the responsible unit or by municipalities located in the responsible unit.

(er) A prohibition on disposing of in a solid waste disposal facility or burning in a solid waste treatment facility any material identified under s. 159.07 (3) and (4) that is separated for recycling as part of the program.

(ew) Provisions for the management of postconsumer waste that is not separated for recycling or recovery under par. (b) consistent with the highest feasible priority under s. 159.05 (12).

(f) Other provisions established by the department by rule.

(g) Adequate enforcement of the programs established under pars. (b) to (f).

(h) The equipment or means necessary to implement pars. (a), (b), (e), (em) and (g), including contracts for service, staff, supplies and equipment from vendors.

(i) A reasonable effort, through the implementation of pars. (a) to (h), to reduce to the maximum extent feasible the amount, by weight, of each material specified in s. 159.07 (3) and (4) that is generated as solid waste within the region and disposed of in a solid waste disposal facility or converted into fuel or burned without energy recovery in a solid waste treatment facility.

(2e) Effective program criteria for out-of-state units.

(a) An out-of-state unit's solid waste management program is an effective recycling program if it is in compliance with all recycling requirements imposed by the state in which the out-of-state unit is located and has all of the components under sub. (2).

(b) The department shall promulgate rules for the determination of comparability under par. (a). The rules shall require the comparison of an out-of-state unit to a similarly situated responsible unit. The rules shall require comparability in at least the following respects:

1. The level of governmental financing for the solid waste management program.

2. Enforcement mechanisms and effort.

3. The number of materials being separated and recycled.

(2m) Variance. (a) In this subsection:

1. "Cost of disposing of processed material" means the gross cost of transferring processed material to a solid waste disposal facility and disposing of the processed material in the facility, including any disposal costs not paid through fees charged by the facility.

2. "Cost of selling processed material" means the net cost, including any storage costs, of selling processed material to a broker, dealer or manufacturing facility, plus any cost of transporting the processed material from the waste processing facility to the destination specified by the broker, dealer or manufacturing facility, less the portion of any state financial assistance received under s. 159.23 or 159.25 attributable to the processed material.

3. "Processed material" means a component of solid waste that has been collected, transported to a waste processing facility and prepared for sale to a broker, dealer or manufacturer.

(b) The department shall, at the request of a responsible unit that has been determined to have an effective recycling program under this section, grant a variance to the requirements in sub. (2) (b) and (er) for up to one year for a material identified in s. 159.07 (3) or (4) that is generated in the responsible unit's region if the department determines that the cost of selling processed material exceeds any of the following:

1. Forty dollars per ton of processed material, as annually adjusted by the department to reflect changes in price levels due to inflation since 1989.

2. The cost of disposing of processed material.

(c) The department may on its own initiative grant, to one or more responsible units that have been determined to have effective recycling programs under this section, a variance to the requirements in sub. (2) (b) and (er) for up to one year for a material identified in s. 159.07 (3) or (4) that is generated in the responsible units' regions if the department determines that the cost of selling processed material exceeds the amount under par. (b) 1. or 2.

(d) The department may grant a responsible unit with an effective recycling program a variance to a requirement in sub. (2) (b) or (er) for up to one year for a material identified in s. 159.07 (3) or (4) in the event of an unexpected emergency condition.

(2s) Notification. (a) The department shall notify the department of agriculture, trade and consumer protection whenever variances granted under sub. (2m) (b) for a plastic container, foam polystyrene packaging or any type of packaging that contains carbonated or malt beverages are in effect for responsible units representing 25% or more of the state's population.

(b) The department shall notify the department of agriculture, trade and consumer protection if, within 2 years after providing notification under par. (a) for a packaging material, the condition under par. (a) no longer exists for that packaging material.

(3) List. The department shall prepare and periodically update a list of responsible units and out-of-state units that have an effective recycling program.